Asia General Equipment and Supplies Sdn Bhd & Ors v Mohd Sari bin Datuk OKK Hj Nuar & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()–13 OF 2010(S)
ZAKI AZMI CHIEF JUSTICE, ZULKEFLI AND JAMES FOONG FCJJ
25 JULY 2011

Civil Procedure — Appeal — Appeal to Federal Court — Interference by appellate court — Judicial precedent — Doctrine of stare decisis — Whether Court of Appeal erred in disregarding established principle — Whether Court of Appeal ought to disturb finding of facts by trial judge

Civil Procedure — Estoppel — Whether doctrine of estoppel would apply to defeat defence of limitation — Whether Court of Appeal erred when it found that plaintiffs' claim was time barred — Limitation of action — Whether limitation set in when plaintiffs' cause of action was redemption — Whether limitation set in when plaintiffs' cause of action was conversion

On 9 February 1983, the plaintiffs, shareholders in a private limited company known as Multi Industries Sdn Bhd ('the company'), entered into a loan agreement ('the loan agreement') with the first defendant. Under the loan agreement, the first defendant agreed to lend the company a sum of RM3m, which was free from all interest, for a period of five years ('the loan period'). As consideration the plaintiffs transferred their shares in the company to the first defendant and its nominees ('the second, third and fourth defendants'). After the loan period had expired, the plaintiffs did not pursue their rights to redeem their shares. Then on 13 July 1995, the first defendant wrote to the plaintiffs to inform them that since the company had not repaid the loan the defendants would be proceeding to foreclose all the shares that were pledged with the first defendant, as provided in the loan agreement. The plaintiffs alleged that the notice of foreclosure by the first defendant on the plaintiffs' shares was void and of no effect. The plaintiffs thus commenced the present action against the defendants wherein, inter alia, they sought a declaration that the foreclosure was null and void; that the plaintiffs should be allowed to redeem the plaintiffs' shares upon repayment by the company of the loan; that the defendants should be restrained by an injunction from enforcing the foreclosure; and/or damages for conversion. It was the plaintiffs' case that the foreclosure by the defendants was 'a clog in the equity of redemption' or alternatively it constituted conversion of the plaintiffs' shares to the defendants' own use thus depriving them of their right to these shares. The High Court judge found that the first defendant was in breach of the terms of the loan agreement and that the

defendants were estopped from using limitation to defeat the plaintiffs' cause of action. The High Court judge thus allowed the plaintiffs' claim with costs. Dissatisfied with this decision the defendants appealed to the Court of Appeal, which allowed the appeal solely on the ground that the plaintiffs' claim was time barred. The plaintiffs then obtained leave to proceed with this appeal, which posed two questions, namely, whether the doctrine of estoppel would apply in this case to defeat a defence of limitation; and when the plaintiffs' cause of action accrued since the pleaded case of the plaintiffs was based on a number of causes of action.

Held, allowing the appeal with costs:

(1) It was settled law that if estoppel applied, then it would defeat a defence of limitation. That being the case, the Court of Appeal's decision to disregard the established principle under the guise of some incomprehensible reason was highly unsatisfactory and should be discouraged. Under the doctrine of stare decisis unless the factual matrix was fundamentally different, the established principle as laid down by a superior court had to be followed. Failure to do so, as in this case, would amount to a wrong application of the law. In the present case, the trial judge had undertaken the onerous task of examining the facts to ascertain whether there was any inequitable conduct and he had come to the conclusion that the plaintiffs had successfully established estoppel. As such, the Court of Appeal should not have disturbed this finding of fact (see paras 30–32).

(2) Further the disclosure of material facts and evidence in the plaintiffs' amended reply had provided sufficient information and time to the defendants to meet the plaintiffs' allegations of estoppel. Thus the defendants were not prejudiced by it (see para 35).

(3) Although the second question pleaded became academic, for completeness this court strove to answer it. It was found that when the plaintiffs sought the return of their shares, their cause of action was redemption. For this cause of action, limitation ran from the time when the plaintiffs, as mortgagees, had a right to redeem their shares, which was when the loan period expired ie after 31 December 1987. Since no limitation period was prescribed to fit the circumstances of this case, the law of limitation under item 97 of the Sabah Limitation Ordinance ('the Ordinance') would apply and this was a period of six years from the time when the plaintiffs' right to sue accrued (see paras 37–38).

(4) As for the plaintiffs' cause of action for conversion of their shares by the first defendant, the right to sue accrued when the conversion took place. In this case, the act of conversion by the first defendant was when he gave

notice on 13 July 1995 to foreclose on the plaintiffs' shares. The time to calculate limitation under Item 37 of the Ordinance was three years from that date (see para 39).

[Bahasa Malaysia summary

Pada 9 Februari 1983, plaintif-plaintif, pemegang-pemegang saham dalam syarikat sendirian berhad yang dikenali sebagai Multi Industris Sdn Bhd ('syarikat tersebut'), telah memasuki perjanjian pinjaman ('perjanjian pinjaman tersebut') dengan defendan pertama. Di bawah perjanjian pinjaman tersebut, defendan pertama telah bersetuju untuk memberikan pinjaman kepada syarikat tersebut untuk jumlah RM3 juta, yang bebas daripada semua faedah, selama tempoh lima tahun ('tempoh pinjaman tersebut'). Sebagai balasan plaintif-plaintif telah memindahkan saham-saham mereka dalam syarikat tersebut kepada defendan pertama dan calon-calonnya ('defendan-defendan kedua, ketiga dan keempat'). Selepas tempoh pinjaman tersebut tamat, plaintif-plaintif tidak meneruskan hak-hak mereka untuk mendapat balik saham-saham mereka. Kemudian pada 13 Julai 1995, defendan pertama telah menulis kepada plaintif-plaintif memberitahu mereka bahawa oleh kerana syarikat tersebut tidak membayar balik pinjaman tersebut defendan-defendan akan meneruskan prosiding untuk merampas semua saham-saham yang telah diletakkan dengan defendan pertama, sebagaimana yang diperuntukkan dalam perjanjian pinjaman tersebut. Plaintif-plaintif mendakwa bahawa notis rampasan oleh defendan pertama ke atas saham-saham plaintif-plaintif tidak sah dan tiada kesan. Plaintif-plaintif dengan itu telah memulakan tindakan ini terhadap defendan-defendan di mana, antara lain, mereka memohon deklarasi bahawa rampasan tersebut adalah terbatal dan tidak sah; bahawa plaintif-plaintif patut dibenarkan mendapat balik saham-saham mereka selepas bayaran balik pinjaman tersebut oleh syarikat tersebut; bahawa defendan-defendan patut dihalang melalui injunksi daripada menguatkuasakan rampasan tersebut; dan/atau ganti rugi kerana penukaran. Adalah kes plaintif-plaitnif bahawa rampasan oleh defendan-defendan merupakan 'a clog in the equity of redemption' atau secara alternatif ia merupakan penukaran saham-saham plaintif-plaintif kepada penggunaan defendan-defendan sendiri dengan itu menafikan hak mereka ke atas saham-saham tersebut. Hakim Mahkamah Tinggi mendapati bahawa defendan pertama telah melanggar terma perjanjian pinjaman tersebut dan bahawa defendan-defendan diestopkan daripada menggunakan had masa untuk menggagalkan kuasa tindakan plaintif-plaintif. Hakim Mahkamah Tinggi dengan itu telah membenarkan tuntutan plaintif-plaintif dengan kos. Berasa tidak puas hati dengan keputusan ini defendan-defendan telah merayu ke Mahkamah Rayuan, yang telah membenarkan rayuan tersebut semata-mata atas alasan bahawa tuntutan plaintif-plaintif telah luput had masa. Berikutan itu plaintif-plaintif telah mendapatkan kebenaran untuk meneruskan rayuan ini, yang mengutarakan dua persoalan, iaitu, sama ada doktrin estopel terpakai dalam kes ini untuk menggagalkan pembelaan had masa; dan bila kausa

tindakan plaintif-plaintif terakru memandangkan kes yang diplid plaintif-plaintif berdasarkan beberapa kausa tindakan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah undang-undang tetap bahawa jika estopel terpakai, maka ia akan menggagalkan pembelaan had masa. Dalam keadaan sedemikian, keputusan Mahkamah Rayuan untuk tidak mengambil kira prinsip tetap dengan berselindung atas sebab-sebab tertentu yang tidak memuaskan dan tidak patut digalakkan. Di bawah doktrin stare decisis kecuali matriks fakta amat berbeza, prinsip yang ditetapkan sebagaimana diputuskan oleh mahkamah atasan hendaklah diikuti. Kegagalan berbuat demikian, sebagaimana dalam kes ini, akan membentuk permohonan salah dari segi undang-undang. Dalam kes ini, hakim perbicaraan telah mengambil berat untuk memeriksa fakta untuk memastikan sama ada terdapat perbuatan tidak saksama dan beliau tiba kepada kesimpulan bahawa plaintif-plaintif berjaya membuktikan estopel. Oleh itu, Mahkamah Rayuan tidak patut mengganggu penemuan fakta ini (lihat perenggan 30–32).

(2) Selanjutnya pendedahan fakta dan keterangan penting dalam jawapan pindaan plaintif-plaintif telah memberikan maklumat dan masa yang mencukupi kepada defendan-defendan untuk membuktikan pengataan estopel plaintif-plaintif. Oleh itu defendan-defendan tidak diprejudiskan olehnya (lihat perenggan 35).

(3) Walaupun persoalan kedua diplidkan menjadi akademik, bagi tujuan melengkapkan mahkamah ini menjawabnya. Adalah didapati bahawa apabila plaintif-plaintif memohon untuk dikembalikan saham-saham mereka, kausa tindakan mereka adalah redempsi. Untuk kausa tindakan ini, had masa bermula dari masa apabila plaintif-plaintif sebagai penggadai, memberikan hak redempsi saham-saham mereka, yang pada masa tempoh pinjaman luput, iaitu selepas 31 Disember 1987. Oleh kerana tiada tempoh had masa ditetapkan yang sesuai untuk kes ini, undang-undang had masa di bawah item 97 Ordinan Had Masa Sabah ('Ordinan') adalah terpakai dan ini adalah tempoh enam tahun dari masa apabila hak plaintif-plaintif untuk menyaman terakru (lihat perenggan 37–38).

(4) Berhubung kausa tindakan plaintif-plaintif untuk penukaran saham-saham mereka oleh defendan pertama, hak untuk menyaman terakru apabila penukaran berlaku. Dalam kes ini, perbuatan penukaran oleh defendan pertama adalah apabila dia memberi notis pada 13 Julai 1995 untuk merampas saham-saham plaintif-plaintif tersebut. Masa untuk mengira had masa di bawah item 37 Ordinan adalah tiga tahun dari tarikh tersebut (lihat perenggan 39).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 833–845.

For cases on estoppel in general, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2854–2913.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Bank Bhd [1995] 3 MLJ 331, FC (refd)

Loh Hoot Yeang v Derrick Edwin David [2006] 2 CLJ 66, CA (refd)

Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651, CA (refd)

Legislation referred to

Sabah Limitation Ordinance Items 37, 97

Appeal from: Civil Appeal No S-02–817 of 2008 (Court of Appeal, Putrajaya)

Joseph Lee (Lim Pitt Kong with him) (PK Lim & Co) for the appellants.
David Fung (Alex Pang & Co) for the respondents.

James Foong FCJ:

INTRODUCTION

[1] This appeal involves limitation period to bring an action. For ease of reading, we shall refer to the parties as they were in the court of first instance. And to appreciate the questions posed to us, we shall begin with the facts.

FACTS

[2] The plaintiffs were shareholders in a private limited company known as Steel Furniture Centre (Sabah) Sdn Bhd ('the company'). The name of the company was subsequently changed to Multi Industries (Sabah) Sdn Bhd.

[3] On 9 February 1983, the plaintiffs, the company and the first defendant entered into a loan agreement ('loan agreement') where the first defendant agreed to lend the company a sum of RM3m free from all interest for a period of five years ('loan period'). This period ended on 31 December 1987. In consideration for this loan, the plaintiffs transferred their shareholdings ('plaintiffs' shares') in the company, as well as the management of the company, to the first defendant, its nominee or nominees. The second, third and fourth

defendants were nominees of the first defendant. This loan to the company was intended to repay Sabah Bank Bhd ('the bank'), which had granted financial facilities to the company for which the plaintiffs were the guarantors. During the loan period, the first, second, third and fourth defendants were entitled to all the dividends and benefits as registered shareholders of the company.

[4] To safeguard the interest of the plaintiffs, the first, second, third and fourth defendants agreed not to, during the loan period, transfer, assign, dispose or otherwise encumber the plaintiffs' shares nor procure the increase or decrease the issued share capital of the company. To further protect the interest of the plaintiffs, the first, second, third and fourth defendants executed share transfer forms in respect of the plaintiffs' shares in escrow. These were kept by a firm of solicitors as stakeholder.

[5] Under the terms of the loan agreement, the loan was to be disbursed by the first defendant to the company in 60 monthly instalments of RM50,000 each commencing from the 1 January 1983. But instead of disbursing the loan to repay the bank, the first, second, third and fourth defendants subjected the company to more liabilities. And as at 10 September 1997, the company owed the bank a staggering sum of RM13,856,136.86. To avoid legal action by the bank, the company serviced only the loan interest.

[6] After the loan period had expired, the plaintiffs did not pursue their rights to redeem their shares. Then on 13 July 1995, the first defendant wrote to one of the plaintiffs informing him that despite having granted the loan of RM3m to the company, the company had not repaid him. He then proceeded to claim that 'by reason of the debt of the said company in the repayment of the loan to me, I have caused to foreclose all the shareholdings pledged to me by you and other shareholders in accordance with the provisions of the said agreement (Loan Agreement)'.

[7] Then on 10 September 1997, the first defendant injected fresh capital into the company. This enabled the company to pay off its loan due to the bank resulting in the release of the plaintiffs as guarantors. With this injection of fresh capital, the company issued 14 million fully paid up shares in the company to the fifth defendant.

[8] Not long thereafter on 17 October 1997, the plaintiffs commenced this action against the defendants.

STATEMENT OF CLAIM

[9] The nature of the plaintiffs' claim, as pleaded, is as follows:

[10] In para 1 of the statement of claim, the plaintiff averred that 'by way of security' the plaintiffs' shares were transferred to the first defendant and his nominees to secure a loan of RM3m to the company.

[11] Then in para 2, the plaintiffs declared that the 'transfer by way of security as aforesaid was in law and in equity a mortgage of the said Shares'.

[12] In para 9, the plaintiffs said that there was no demand made on them by the first defendant to repay the loan nor were they aware of any similar demand made to the company.

[13] Then in the subsequent paragraphs, the plaintiffs disclosed the notice of foreclosure by the first defendant on the plaintiffs' shares which they claim is void and of no effect since it is 'a clog on the equity of redemption'.

[14] And in the alternative, the plaintiffs pleaded that the first defendant's foreclosure constituted conversion of their shares to the defendants' own use thus depriving them of their right to these shares.

[15] Further, they alleged that the defendants as trustees for the plaintiffs' shares should render accounts to the plaintiffs.

[16] For reliefs, the following were sought:

(a) a declaration that the foreclosure is null and void;

(b) redemption of the mortgage of the plaintiffs' shares and the same be re-transferred to the plaintiffs;

(c) alternatively, the plaintiffs be allowed to redeem the plaintiffs' shares upon repayment by the company of the loan;

(d) the defendants resign as directors of the company to be replaced by the plaintiffs and that the management and control of the company be given to the plaintiffs;

(e) an injunction to restrain the defendants from enforcing the foreclosure, encumbering the company, or selling, transferring, charging and pledging the plaintiffs' shares as well as the company's land;

(f) a declaration that the defendants hold the plaintiffs' shares on trust for the plaintiffs;

(g) alternatively, damages for conversion;

(h) an account be taken of the company's expenditure from 31 December 1987 and if found due to pay the plaintiffs such sum with interest; and

(i) costs.

HIGH COURT

[17] After a lengthy trial, the High Court listed out six issues and made the following ruling:

First issue: whether there was transfer of the plaintiffs' shares to the first defendant and his nominees?

[18] In respect of this, the trial judge answered it by first declaring:

> Upon the hearing and reading the agreement dated 9 February 1983, I note that the essence of the contract was that in consideration for the exclusive control of the company for five years, the first defendant would pay RM6m to Sabah Bank within the five years in repayment of the company's debt, RM3m of which was an interest-free loan repayable.

[19] But then in the last paragraph on this issue, he said:

> I am of the view that there was an agreement for the sale of shares between the parties. As such there is a valid contract between the parties.

Second issue: what are the terms and obligations between the parties?

[20] For this second issue, the trial judge virtually repeated all the relevant terms in the loan agreement.

Third issue: who breached the contract?

(a) The first defendant transferred the shares away in 1986 even before the loan period has expired; this is in breach of cl 13 of the loan agreement;

(b) the first defendant failed to pay the agreed monthly instalments on behalf of the company to the bank resulting in an increase in the company's liability to the bank;

(c) the first defendant increased the share capital of the company and allotted these shares to the fifth defendant which is contrary to cl 13 of the loan agreement;

(d) as a result of these breaches, the first defendant had 'made a complete mockery of the contract. With the company under his control with a new name to boot, he now comes to court asking for equitable defences of abandonment, waiver and acquiescence. But equity does not assist a man who comes with unclean hands. To do so would be awarding him for his breaches'; and

(e) and finally, though the first defendant injected capital into the company to repay the bank 'he did nothing more than to discharge his contractual obligation under the contract'.

[21] On this, the trial judge found against the first defendant and supported it with the following:

Fourth issue: whether the plaintiffs' claim is statute barred?

[22] The trial judge was of the view that estoppel applied. He found that the defendants were 'estopped from using limitation to defeat Plaintiffs' cause of action based on the peculiar nature of this case'. He then went on to add that, 'there is no necessity to expressly include estoppel (in the pleadings) so long as the material facts and evidence giving rise to estoppel is pleaded'. The case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Bank Bhd* [1995] 3 MLJ 331 was cited in support of this proposition.

Fifth issue: Whether the plaintiffs have abandoned their claim?

[23] On this the High Court ruled:

> Once you foreclose your shares then you cannot argue on abandonment, waiver and acquiescence. Foreclose means: you realize the payment of the debt. Clearly, there is no evidence here on abandonment, waiver and acquiescence.

Sixth issue: whether the plaintiffs had by their conduct acquiesced and waived their rights to insist on the re-transfer of the shares in the company under the said loan agreement

[24] For this, the trial judge said:

> I hold that the plaintiff had not by their conduct acquiesced or waived their rights to insist on the re-transfer of the shares in the company under the said loan agreement.

[25] In conclusion, the High Court allowed the plaintiffs' claim with costs.

COURT OF APPEAL

[26] Dissatisfied with this decision, the defendants appealed to the Court of Appeal. The Court of Appeal allowed the appeal solely on the ground that the plaintiffs' claim was time barred and gave the following reasons:

> We feel that this limitation defence stood independent of the merits since the cause of action by the plaintiffs is to enforce a written agreement and as such limitation applies … Our reasons for allowing this appeal now follow.

The agreement period was from 1 January 1983 till 3 December 1987. The plaintiffs chose not to commence any action until almost ten years (filing of this suit was on 17 October 1997) and long after the expiry of the agreement period, which we put as 31 December 1987.

Section 3 of the Limitation Ordinance (Sabah Cap 7) in peremptory language states that every suit instituted after the period of limitation prescribed therefore by the Schedule shall be dismissed' …

The plaintiffs in their amended reply denied that the action was time barred and averred at para 5.2(a):

that the said Agreement was not a mere loan agreement, but that under it the said shares were mortgaged to the 1st Defendant by way of security to secure the loan of RM3,000,000.00 to be lent to the Company by the 1st Defendant, and as such, the equity of redemption is not destroyed by the passage of time as the said shares are still available, and the redemption sum could still be paid …

And since this foreclosure of the said shares occurred on 13 July 1995 … it was only from that date (13 July 1995) that the plaintiff lost their rights to redeem. He further contended that the foreclosure was actually a clog on the plaintiffs' equity of redemption. Time therefore runs from that date. As such the plaintiffs had not been time-barred when this action was filed on 17 October 1997.

The second thrust of the plaintiffs' argument is that the first defendant had committed various breaches of the agreement … and this was accepted by the learned trial judge, that the transgressions from those breaches amounted to a clog on the plaintiffs' equity of redemption …

We are of the view that the cause of action is founded on contract and the breaches of the agreement. These breaches were alleged to have occurred since May 1984. The learned judge had used the doctrine of estoppel to bar the defendants from raising the limitation defence and referred to the passage in *Loh Hoot Yeang v Derrick Edwin David* [2006] 2 CLJ 78 … With respect, we think that this passage was taken out of context to the argument on limitation … The passage quoted thus must be confined to that part of the trial judge's finding only ie that the appellant could no longer deny the existence of a contract. It is not a pronouncement that due to the breaches committed by a party, that party is thus estopped from raising the statutory defence of limitation …

On the clog of the equity of redemption argument … would only arise if by a provision in the mortgage deed or in this instance the agreement, the mortgagor is prevented from redeeming its mortgaged property. This does not arise in this case.

The agreement between the parties ended on 31 December 1987 ie at the end of the loan period. The shares were redeemable by the plaintiff under cl 6 of the agreement, or at the latest on that expiry date. In fact when the purported breach arise as early as 9 May 1984, when the defendants failed to release the loan, resulting in the amount owed to Sabah Bank to accumulate, the plaintiffs should have then pursued their rights to redeem. But they chose to wait and see. The cause of action arose at the latest on 1 January 1988 ie the day after the expiry of the agreement. We are of the view that the plaintiffs have slept too long on their right, having filed this action almost ten years later.

A QUESTIONS BEFORE THE FEDERAL COURT

[27] Leave to appeal was granted by this court on two questions:

(a) whether the doctrine of estoppel bars a litigant who is guilty of unconscionable conduct from raising and relying on limitation as a B defence; and

(b) whether the causes of action founded upon:

(i) the right to redeem a mortgage; and

C (ii) the conversion of mortgaged shares

accrue upon the letter dated 13 July 1995 issued to the plaintiffs by the first defendant.

ANALYSIS

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First question: whether the doctrine of estoppel bars a litigant who is guilty of unconscionable conduct from raising and relying on limitation as a defence

E **[28]** Regrettably, the Court of Appeal has failed to consider the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant bank Bhd* in their judgment. In this case, the Federal Court has declared that:

> The time has come for this court to recognise that the doctrine of estoppel is a F flexible principle by which justice is done according to the circumstance of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the G doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

[29] In fact, the factual matrix in *Alfred Templeton & Ors v Low Yat Holdings* H *Sdn Bhd & Anor* [1989] 2 MLJ 202 is very similar to that of our present case. There, the sale of the land to the defendant was conditional upon a right of way preserved in favour of the plaintiff. The defendant disregarded this condition in the agreement and set up limitation as a defence when they were sued by the plaintiff for breach of this condition. Justice Edgar Joseph Jr J decided that:

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> So far as may be necessary, I would hold that based on these dicta the Limitation Act is purely procedural: see *Othman and Anor v Mek and Michell v Harris Engineering Co Ltd*. And, therefore, in certain circumstances, one can estop oneself out of the Limitation Act by conduct.

[30] In the present case, the Court of Appeal attempted to distinguish *Loh Hoot Yeang v Derrick Edwin David* [2006] 2 CLJ 66, a decision of the same court which has also accepted that estoppel can defeat a defence of limitation on facts. The Court of Appeal circumvented this by saying that the pronouncement in *Loh Hoot Yeang v Derrick Edwin David* is restricted 'to that part of the trial judge's finding only'. We cannot appreciate this kind of reasoning when the general principle of law has been clearly set out not only by the Court of Appeal in an earlier case but also by the Federal Court. To disregard such an established principle under the guise of some flimsy and incomprehensible reason is highly unsatisfactory and must be discouraged. Here we like to reiterate that the doctrine of stare decisis must be adhered to by a court or courts below otherwise there will be uncertainty in the law and this would cause severe confusion. Judges in the court below should refrain from changing the law set by a superior court under the guise of distinguishing the case on facts. Unless the factual matrix is fundamentally different, established principle laid down by a superior court must be followed. Failure to do so, as in this case, amounts to a wrong application of the law.

[31] However, we must stress that though the equitable doctrine of estoppel is available in law, to be successfully invoked requires meticulous examination of the facts in each case to ascertain whether there was any inequitable conduct — see *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651 at p 664.

[32] In this instance, when the trial judge having undertaken this onerous task and came to a conclusion that the plaintiffs have successfully established estoppel, the Court of Appeal should not have disturbed this finding of fact.

[33] Further, the trial judge also found that due to the first defendant's improper conduct the plaintiffs were prevented from filing this action earlier. Again, this is a finding of fact supported by cogent evidence. The Court of Appeal should not have replaced it with one of its own to prevent the plaintiffs from pursuing their claim by a defence of limitation.

[34] Before we depart from this subject we would like to discuss the defendant's objections that the plaintiffs' had delayed raising estoppel in their pleasings and had failed to expressly plead the same.

[35] On these issues, it is unnecessary for us to give a lengthy exposition since firstly it has already been established in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* that there is no necessity to include a plea of estoppel in the pleadings if the material facts and evidence giving rise to this doctrine is disclosed in the pleadings itself. In this instance, the plaintiffs had in their amended reply pleaded material facts to support a claim for estoppel and

this, for the purpose of this case, is sufficient, in our opinion, to prevent such claim from being defeated by the lack of an explicit statement to say so. Further, such disclosure of material facts and evidence in the plaintiffs' reply would have provided sufficient information and time to the defendants to meet this plaintiffs' allegation; thus, the defendants were not prejudiced by it.

[36] For reasons aforesaid, our answer to the first question is in the positive.

Second question: whether the causes of action founded upon: (a) the right to redeem a mortgage; and (b) the conversion of mortgaged shares accrue upon the letter dated 13 July 1995 issued to the plaintiffs by the first defendant

[37] Since we have accepted estoppel applies in this case to defeat a defence of limitation, this second question is academic. Nevertheless, for completeness we shall answer it.

[38] The pleaded case of the plaintiffs is based on a number of causes of action; some pleaded in the alternative. For the return of the plaintiffs' shares, the cause of action is redemption. For this cause of action, limitation runs from the time when the plaintiffs, as mortgagees, have a right to redeem their shares. Such right would be after the 31 December 1987, when the loan period expired as provided by cl 2 of the loan agreement. In our view, it could not have commenced from the date when the first defendant, as mortgagor, foreclosed on the plaintiffs' shares. The plaintiffs' shares may have been affected by the first defendant's letter of 13 July 1995 but the plaintiffs' right to sue commenced only after the 31 December 1987. Foreclosure is the right of the mortgagor (the first defendant) not that of the mortgagees (the plaintiffs). The right of the mortgagees for the purpose of limitation must be from the time when their right to sue accrues and in this case, as it stands, must be after 31 December 1987. This is the time when the plaintiffs' right as mortgagees to redeem their mortgaged property commenced. It should not be calculated from the time when their right was affected. For the purpose of this case, since no limitation period is prescribed to fit the circumstances of this case, the law of limitation under Item 97 of the Sabah Limitation Ordinance is a period of six years from the time when the plaintiffs' right to sue accrues.

[39] As for the plaintiffs' cause of action for conversion of their shares by the first defendant this requires different treatment for calculating limitation. The right to sue for this a cause of action accrues when the conversion took place. In this instance, the act of conversion by the first defendant was when he foreclosed on the plaintiffs' shares. This was on 13 July 1995 when he gave notice to the plaintiffs. The time to calculate limitation under Item 37 of the Sabah Limitation Ordinance is three years 'when the person having the right to the possession of the property first learns in whose possession it is'.

[40] With the aforesaid, our answer to the second question is in the manner as illustrated.

CONCLUSION

[41] Having examined and considered all facts, we allow this appeal with costs (having being informed that the respondents had withdrawn all other grounds of appeal before the Court of Appeal except for limitation). The order of the Court of Appeal is set aside. The order of the High Court affirmed.

Appeal allowed with costs.

Reported by Kohila Nesan